

# Agricultural Law Update

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## INSIDE

- In depth: Treatment of equine related sales under statutory and common law implied warranties
- Agricultural law bibliography
- *Federal Register* in brief

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## IN FUTURE ISSUES

- Developments in hedge to arrive

## Clean Water Act § 404 "incidental fallback" rule invalidated

In a case now on appeal to the District of Columbia Circuit, a district court has invalidated the so-called "Tulloch rule," a rule promulgated by the EPA and the Army Corps of Engineers which included "incidental fallback" within the definition of "discharge of dredged material" for purposes of § 404 of the Clean Water Act. *American Mining Congress v. United States Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997). More recently, the same court refused to limit its injunction against the enforcement of the rule only to the plaintiffs in the litigation. *American Mining Congress v. United States Army Corps of Engineers*, 962 F. Supp. 2 (D.D.C. 1997).

Under §§ 301 and 502 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1362, any discharge of dredged or fill materials into the waters of the United States is prohibited unless authorized by a permit issued by the Army Corps of Engineers pursuant to § 404 of the Act, 33 U.S.C. § 1344. Neither "dredged" nor "fill" materials are defined in the Act; they are, however, defined in regulations adopted by the Corps of Engineers and the EPA, which may veto permits issued by the Corps. 33 C.F.R. § 323.2, 40 C.F.R. § 232.2.

Until 1993, neither the EPA nor the Corps regulated the removal of materials from waters of the United States even when, as unavoidably happened, the removal of materials through dredging and similar activities was accompanied by some "incidental fallback." "Incidental fallback is the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled, or the back-spill that comes off a bucket and falls back into the same place from which it was removed." *American Mining Congress*, 951 F. Supp. at 270. Until 1993, only when the removal activities placed the removed soil alongside a ditch, a practice known as "sidecasting," or caused significant discharges as a result of sloppy disposal practices did the EPA and the Corps invoke § 404. *Id.* at 270 n. 4.

In 1993, however, the regulatory landscape changed with the adoption by the Corps and the EPA of the so-called "Tulloch rule." That rule redefined the term "discharge of dredged material" to include incidental fallback by including within the definition "any addition, including any redeposit, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation."

*Continued on page 2*

## Plants pay a price in fitness for herbicide resistance

Are genetically engineered plants more competitive than their nontransgenic counterparts? Or is there an inevitable fitness cost associated with genetic alternations? These questions have received increasing attention as the ability to engineer plants has grown and more transgenic crops are released into the environment. The concern underlying these questions is that the very genes incorporated into crop genomes to enhance their vigor, disease-resistance, or herbicide-tolerance, may lead to the creation of "super weeds" by escaping into the environment through out-crossing with weedy relatives or by the transgenic crop itself turning into a weed. This possibility has prompted much speculation, but little solid research.

With respect to herbicide resistance, it has long been known that certain gene mutations result in reduced fitness for the plant. For example, weeds that have target-site resistance to the triazine herbicides (photosynthesis inhibitors) exhibit decreased electron transport through photosystem II. In the presence of the herbicide, the resistance trait confers a huge selective advantage over non-resistant competitors because it spares the life of the resistant plant. But in the absence of herbicide selection pressure, photosynthesis in the resistant plants is less efficient than that of wild-type counterparts, thus resistant plants are at a selective disadvan-

*Continued on page 7*

33 C.F.R. § 323.2(d)(1)(iii), 40 C.F.R. § 232.2(1)(iii). The rule also provided that a § 404 permit was not required where the "incidental addition ... does not have or would not have the effect of destroying or degrading an area of waters of the United States...." 33 C.F.R. § 323.2(d)(3)(i), 40 C.F.R. § 232.2(3)(i). However, that exception did not apply to "any person preparing to undertake mechanized land clearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States...." *Id.* The rule placed the burden of making such a showing on the person proposing to undertake such an activity. *Id.*

The *Tulloch* rule evolved out of an agreement between the plaintiffs and the government in *North Carolina Nat'l Wildlife Fed'n v. Tulloch*, Civ. No. C90-713-CIV-5-

BO E.D.N.C. 1992). In *Tulloch* a developer had developed 700 acres of wetlands by sealing openings in equipment used to drain the wetlands to prevent incidental fallback and by transporting the removed materials to another location to avoid "sidecasting." By taking these steps, the developer made plain the "loophole" that existed in the then current Corps and EPA regulations.

In settling the case, the Corps and the EPA to close the "loophole" in their regulations. That is, they agreed to propose changes in the definition of the term "discharge of dredged material" to include, "without limitation, any addition of dredged materials, including excavated materials, which is incidental to any activity [excluding work on navigation channels], including mechanized landclearing, ditching, channelization, or other excavation, which has or would have the effect of destroying or degrading any area of waters of the United States." *American Mining Congress*, 951 F. Supp. at 269-70 (citation omitted). The only exception, apart from work on navigation channels, was incidental, de minimis soil movement which did not—or would not—have the effect of destroying or degrading any area of waters of the United States. *Id.* In 1993, the Corps and the EPA followed through with that agreement by adopting final rules consistent with the terms of the agreement. See 58 Fed. Reg. 45,008 (1993).

The effect of the *Tulloch* rule, according to the court in *American Mining Congress*, was to require a § 404 permit for mechanized landclearing, ditching, channelization, or other excavation "[b]ecause incidental fallback is almost always associated with excavation and land clearing, and because [under the rule] this soil movement is considered a discharge...." *American Mining Congress*, 951 F. Supp. at 270. Since the size of the discharge no longer mattered, "the *Tulloch* rule altered the agencies' previous policy to focus on the environmental effect of the activity resulting from the discharge, rather than on the size of the discharge." *Id.* By in effect creating a "rebuttable presumption" that jurisdiction under § 404 exists, the only way one could avoid the need to obtain a permit would be to establish to the agencies' satisfaction, before the project was commenced, that the activity would have de minimis environmental effect. *Id.*

In invalidating the *Tulloch* rule and enjoining its enforcement, the court in *American Mining Congress* held that the rule exceeded the agencies' statutory authority. *Id.* at 271. It reached that result by relying primarily on its construction of § 404, the legislative history of the Clean Water Act, congressional acquiescence to the regulatory scheme the rule replaced, caselaw, and congressional refusal to ex-

pand the scope of regulated activities under § 404. *Id.* at 271-79. At the core of its analysis, however, was the court's conclusion that Congress intended for "discharge" to mean the relocation of material from one site to another. Incidental fallback, on the other hand, is not the relocation of material. As explained by the court, "[i]ncidental fallback associated with excavation or landclearing does not add material or move it from one location or another; some material simply falls back in the same general location from which most of it was removed." *Id.* at 273. Hence, according to the court, if excluding incidental fallback from the definition of the term "discharge of dredged material" leaves a "loophole" in § 404, the remedy is congressional, not regulatory, action. *Id.* at 279.

—Christopher R. Kelley, Hastings, MN

## Federal Register in brief

The following is a selection of items that were published in the *Federal Register* from May 7 to June 6, 1997.

1. APHIS; Accredited veterinarians; optional digital signature; final rule; effective date 5/9/97. 62 Fed. Reg. 25444.

2. Farm Service Agency; Implementation of the boll weevil eradication program; interim rule with request for comments; comments due 7/15/97. 62 Fed. Reg. 26918.

3. Farm Service Agency; Implementation of the direct and guaranteed loanmaking provisions of FAIRA 96; corrections; effective date 5/27/97. 62 Fed. Reg. 28618.

4. Foreign Agricultural Service; Criteria for evaluating market development proposals for participation in the Foreign Market Development Cooperator Program. 62 Fed. Reg. 27006.

5. CCC; Environmental Quality Incentives Program; final rule; effective date 5/22/97. 62 Fed. Reg. 28258.

6. CCC; Farmland Protection Program; notice of request for proposals; proposals due 7/14/97. 62 Fed. Reg. 28836.

6. FCIC; Collection and storage of Social Security account numbers and Employer Identification numbers; final rule; effective date 6/26/97. 62 Fed. Reg. 28607.

7. USDA; Agricultural Marketing Service; regulations governing the Fresh Irish Potato Diversion Program; 1996 crop. 62 Fed. Reg. 29649.

8. Natural Resources Conservation Service; Soil Survey Division Research Program. 62 Fed. Reg. 31063.

—Linda Grim McCormick, Alvin, TX

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—Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

P.S. Lawyers researching agricultural law issues should remember that the USDA's Economic Agencies (Economic Research Service, National Agricultural Statistics Service, and the World Agricultural Outlook Board) produce many publications that are highly relevant to the agricultural lawyer. The ANNUAL ISSUE, PRODUCTS AND SERVICES FROM ERS - NASS lists each publication with a short abstract. Agricultural Lawyers may order a copy of this ANNUAL ISSUE by calling 1-800-999-6779 for a free subscription. You may also use the Internet at <http://www.econ.ag.gov/prodsrvs/reports/htm> (for periodicals) and <http://www.econ.ag.gov/prodsrvs/dataproduct.htm> (for data products).

## Treatment of equine related sales under statutory and common law implied warranties

By Jared Melton

Sales related to equines are subject to the implied warranties of merchantability and fitness for a particular purpose in the Uniform Commercial Code.<sup>1</sup> In addition, common law warranties also apply. The application of implied warranties to an equine transaction is worthy of examination because of the unique nature of many horse related transactions. The horse's delicate state of health, breeding capacity, industry quirks, and varied possible functions and uses all create situations in which the applicability of these warranties may be unclear. In addition, many of the cases construing equine related sales refer to the term "soundness," and a knowledge of its legal meaning is necessary for many equine transactions.<sup>2</sup>

### Statutory implied warranties: prerequisites

Certain preconditions must be met before the U.C.C. implied warranties may be invoked. The transaction must be one in goods.<sup>3</sup> The implied warranty of merchantability is imposed only upon merchants of a particular type of goods.<sup>4</sup> Before sustaining a breach of implied warranty action, notice of the breach must be given.<sup>5</sup>

In meeting the first condition, one must establish that horses are goods. Animals in general are goods under the U.C.C.<sup>6</sup> In *Archibald v. Act III Arabians*, the Texas Supreme Court declared that "a horse is an existing tangible good."<sup>7</sup> Various authorities have considered all livestock to be goods under the U.C.C.<sup>8</sup>

The requirement of "merchant status"<sup>9</sup> for the implied warranty of merchantability can be a more exacting standard. The issue of deciding a seller's merchant status in relation to horses is the subject of much contention.<sup>10</sup> A person (which includes any legal entity or organization<sup>11</sup>) is a merchant if he deals in goods of the kind OR holds himself out as having particular knowledge or skill of practices in the relevant area OR employs an agent or broker with such skill the use of which may be attributed to the principal.<sup>12</sup> Proving that a person is a casual or inexperienced seller, on the other hand, may negate merchant status.<sup>13</sup> The frequency or infrequency of involvement in the horse trade may become irrelevant if the person's income is derived from the buying and

selling of horses, in which case he will probably be held a merchant.<sup>14</sup>

A leading case construing "goods of the kind"<sup>15</sup> in this area is *Fear Ranches, Inc. v. Berry*, involving the sale of cattle.<sup>16</sup> In *Fear Ranches*, an experienced rancher derived his income from the sale of cattle to meat packers.<sup>17</sup> The sale in question, however, was a sale of cattle to breeders.<sup>18</sup> The court held in favor of the rancher, recognizing the need to classify the cattle by their intended use.<sup>19</sup> This holding provides a basis for merchant status as to particular types of horses, but is by no means comprehensive. A holding relative to "horse merchants" should be much more class intensive. Cattle are sold primarily for either meat or dairy production and for breeding. Horses on the other hand, have an almost infinite number of uses including racing, cutting, roping, jumping, trail riding, and breeding.

Horses share one system of classification with cattle in that both can be grouped by breed associations with certain minimum criteria to meet for eligibility. The question remains unanswered as to how narrow a classification may be to grant merchant status. One may be an expert in raising champion Quarter Horse halter horses, yet know absolutely nothing about the breeding, training, and nutritional requirements of a Quarter Horse race horse. Courts should construe the "goods of the kind" requirement as narrowly as possible because of the extremely wide spectrum of knowledge to be mastered. For instance, if the rancher in *Fear Ranches* was not held liable because he had never before sold horses for the buyer's intended purpose of breeding, then a professional cutting horse trainer who happenstance moves one racehorse through his inventory should accordingly not be held liable as a merchant of racehorses.

The final prerequisite to sustaining a breach of implied warranty is the requirement of notice. When goods have been accepted, the buyer must notify the seller of any breach within a reasonable time after he discovered or should have discovered the breach.<sup>20</sup> Industry custom in the horse trade is to allow for inspection on sale day.<sup>21</sup> This fact is relevant because it determines when a buyer should have known of a defect in the animal purchased.<sup>22</sup> If the defect is obvious, the buyer should have known of its existence, and such knowledge may constitute a waiver of the implied warranty of merchantability.<sup>23</sup> If the defect is latent, the buyer may have more time in which to discover the defect and provide the seller with notice thereof.<sup>24</sup>

### The implied warranty of merchantability

The most often repeated grounds for breach of the implied warranty of merchantability is that the horse, because of some disease or health defect, is not suitable for its ordinary purpose for which it is to be used.<sup>25</sup> In response to this ground for claiming a breach of the implied warranty, most states have changed the law to eliminate this provision if the state depends to any noticeable degree on agriculture economically.<sup>26</sup>

Cases use the industry concept of "soundness" to determine the warranty of merchantability.<sup>27</sup> In conjunction with standard definitions of soundness, there is also a "damage" requirement to the breach of this warranty.<sup>28</sup> A disease-caused alternation in a horse's structure or conformation will not automatically give rise to a cause of action for breach of the implied warranty of merchantability.<sup>29</sup> In addition, there must be proof that the condition will diminish the value of the animal.<sup>30</sup>

One issue in equine related sales that is growing in importance is the sale of cooled shipped stallion semen. Treatment of semen is currently very significant because the 1997 breeding season is the first year that the American Quarter Horse Association has allowed the use of cooled shipped semen.<sup>31</sup> There are 2,580,087 registered Quarter Horses in the United States, making it the most numerous breed in the nation.<sup>32</sup> Hence, the shipment of cooled semen in 1997 is likely to result in questions regarding the applicability of the implied warranties to these sales.

Section 2-314(2)(a) requires that goods "pass without objection in the trade under the contract description" to be merchantable. This subsection should meet with very little objection. Subsection (2)(b) requires that the goods be of fair average quality within the description, which would necessitate an evaluation of the stallion's semen. "The percentage of motile spermatozoa in an ejaculate is usually 60 to 100 percent, and 70 percent is considered quite good."<sup>33</sup> Courts are likely to pursue the establishment of a bright line standard in semen quality, which would be misleading because of the fact that pregnancy can result from such a broad range of semen quality.<sup>34</sup> Carol Rose Quarter Horses, a leading breeding farm in Texas, commonly ships two breeding doses per shipment, and attempts to include one half million sperm per dose, depending on the stallion's capability.<sup>35</sup> Subsections (2)(c) ["are fit for the ordinary

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purpose for which such goods are used"] and (2)(d) [run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved"] are closely interrelated with subsection (2)(b). If the semen meets the standards set forth in (2)(b), it will probably also meet the standards of (2)(c) and (2)(d).

Subsection (2)(e) requires that the semen be "contained, packaged and labeled as the agreement may require." Cooled shipped semen is transported in a patented device called an Equitainer, which keeps the semen at the proper temperature.<sup>36</sup> Subsection (2)(f) ["conform to the promise or affirmations of fact made on the container or label if any"] is closely tied to (2)(e). Any labeling information must be correct in order to be in compliance with (2)(f). In addition, if any further promises or representations are made on the label of the Equitainer or the semen vial, those promises or representations must be upheld.

Practitioners litigating semen cases must be aware of the variety of exemptions that states have created to the implied warranty of merchantability. Texas, for example, has declared that "The implied warranties of merchantability and fitness do not apply to the sale or barter of livestock or its unborn young."<sup>37</sup> Under this and the various other new state exemptions, semen would probably not be treated as "livestock" or "unborn young."<sup>38</sup> However, considering the movement of agricultural states to protect their producers, new legislation exempting semen sales from the warranties would hardly be surprising.

Although no cases of shipped equine semen have arisen, the courts have applied the warranty of merchantability to shipped bull semen.<sup>39</sup> In the past, courts have sometimes used cases involving cattle as precedent for cases involving horses.<sup>40</sup> Because of differences in industry practices, this habit of applying bovine law to equine situations should be examined *very* carefully. In the case of shipped semen sales, there are radical differences in industry practice.

In the case of [bovine] semen sold for artificial insemination, the seller knows that if the semen is defective, the inseminated cow may not become pregnant and the capital investment devoted to that cow in that year may be totally unproductive.<sup>41</sup>

In the case of *Waddell v. American Breeders Serv., Inc.*, the semen paid for by the rancher was almost totally useless and did not impregnate his cattle.<sup>42</sup> There, the only method used (which was the industry standard) of determining semen effectiveness was using a "cleanup bull" of another breed.<sup>43</sup> In horses, the indus-

try standard includes a pregnancy check 10-18 days after breeding to determine if the mare has been impregnated.<sup>44</sup> In addition, sales of equine semen should be allowed more leeway because of scientific differences in the semen. Bull semen is more easily shipped than horse semen.<sup>45</sup>

As a result of this factor, taken in conjunction with the fact that another equine industry standard is a live foal guarantee, greater leeway should be allowed stallion owners than bull owners.

As a practical matter, attorneys should be aware of many ramifications of the applicability of the implied warranties to the sale of cooled shipped semen. Express warranties should be as specific as possible, and breeding contracts should state exactly what the "live foal guarantee" entails and what its limitations are with respect to the shipment of cooled shipped semen. Exclusions of implied warranties are allowed, and such exclusions should be fully in compliance with the law of the relevant jurisdictions.

Choice of law provisions also become very important with the advent of cooled shipped semen. The advantage of using cooled shipped semen is the fact that it allows the use of a stallion very geographically distant, with no shipping trauma for the mare.<sup>46</sup> As a result, the mare and stallion may be located in different states or even countries. Choice of law provisions are now points that may be negotiated. Given the exemptions and public policy differences between agricultural and nonagricultural states, choice of law may decide the case.

If the courts should follow the ill-advised practice of applying bovine precedent to equine situations, stallions owners may find themselves liable for the value of a foal and not merely for the value of the semen shipment if a mare fails to impregnate. In *Two Rivers Co. v. Curtiss Breeding Serv.*, the lower court found the damages for defective semen to be the proposed value of the calves and not the semen value.<sup>47</sup> In this case, the semen did not fail to impregnate the cows but rather inseminated the cows with semen carrying a genetic defect causing stillborn calves and loss of herd reputation.<sup>48</sup> This indicates the possibility that a stallion owner shipping bad semen could conceivably be liable for the cost of a foal, which in the case of show and/or race horses could mean liability in the tens of thousands of dollars. In Texas, privity of contract is not required for the recovery of purely economic loss on a breach of implied warranty of merchantability.<sup>49</sup> Buyers of pregnant mares under this jurisdiction may have a cause of action against the stallion owner with whom they had no contract. With this in mind, attorneys may consider drafting not only exclusions

of the implied warranties, but also limitation of damages clauses into breeding contracts to protect clients.

Treatment of embryos is more straightforward under the Uniform Commercial Code. The U.C.C. section 2-105, comment 1 provides that the young of animals are within the definition of goods and may even be contracted for before birth. As previously mentioned, Texas specifically exempts "unborn young" from inclusion within the implied warranty of merchantability.<sup>50</sup> Each individual jurisdiction must be checked for an exemption, but absent such an exemption, the provisions of the implied warranty of merchantability do apply to embryos.

### **Implied warranty of fitness for a particular purpose**

The implied warranty of fitness for a particular purpose is contained in Uniform Commercial Code section 2-315. Its provisions are more specialized than those of the warranty of merchantability, but it does notably lack the inclusion of a "merchant status" requirement.<sup>51</sup> The warranty of fitness for a particular purpose is a more specific warranty than the warranty of merchantability.<sup>52</sup>

First, the seller must know of the particular purpose for which the goods are being sought. Second, the seller must know that the buyer is relying on the seller's skill or judgment. This warranty is disclaimable under U.C.C. section 2-316.

The first prong, that of the particular purpose for which the goods must be sought, is often a misunderstood requirement.<sup>53</sup> The rationale underlying this warranty and its differentiation from the warranty of merchantability is that merchantability covers basic uses of goods, and a specific use by the buyer is covered by the warranty of fitness for a particular purpose.<sup>54</sup> Hence, this warranty differs in that horses covered by this warranty cannot be used for the ordinary purpose for which horses of that type are used.

A particular purpose is different from an ordinary purpose because the use of the goods must be specific, peculiar to the nature of the buyer's business.<sup>55</sup> In horses, it has been said that a particular purpose might be when a racehorse is sold for use as a jumping horse where the seller knows that the buyer intends to use the horse as a jumper.<sup>56</sup> In *Alpert v. Thomas*, the buyer purchased an Arabian stallion for use as a breeding animal.<sup>57</sup> In this case, the stallion was being purchased only for the purpose for which stallions are normally used. The court correctly allowed recovery only on theories of express warranty and warranty of merchantability.<sup>58</sup> In order to recover under a theory of fitness for

*Continued on page 6*

a particular purpose, the horse *must* be purchased for a purpose out of the scope of the ordinary usage of such a horse.

The next prong of the warranty test is that of reliance on the seller's skill and judgment.<sup>59</sup> In *Whitehouse v. Lange*, a fitness for breeding case, the Idaho Court of Appeals held that reliance is the key element on which the warranty of fitness for a particular purpose turns.<sup>60</sup> Further, reliance need not be on the seller's skill or judgment in *selecting* a suitable animal.<sup>61</sup> A buyer may choose from among several individual units *furnished* by seller, and still consider this reliance on seller's skill and/or judgment.<sup>62</sup> The use of a supervening agent may cut off liability of a seller depending on the amount of reliance on the relevant parties found by the trier of fact.<sup>63</sup> If a jury were to find that the buyer's reliance was primarily on his agent, rather than on the seller, then the seller might be relieved of any liability.<sup>64</sup>

### Common law implied warranty of good and workmanlike performance

The warranty of good and workmanlike performance is a Texas common law implied warranty.<sup>65</sup> This warranty states that an "implied warranty of good and workmanlike performance applies to services involving the repair or modification of existing tangible goods or property."<sup>66</sup> The focus of this warranty is not the result of the repairs, but rather on the manner in which the repairs are done.<sup>67</sup> Further, this warranty may not be waived or disclaimed.<sup>68</sup> A limitation of liability, however, is possible.<sup>69</sup>

The Texas Supreme Court held in *Archibald v. Act III Arabians* that the warranty of good and workmanlike performance applies to horse training services.<sup>70</sup> First of all, to qualify for the warranty, it must be established that a horse is an existing tangible good.<sup>71</sup> Next, the warranty requires that the services must involve the *repair or modification* of existing tangible goods or property.<sup>72</sup> The Texas Supreme Court held that "Training introduces new elements to enhance the horse's capabilities and personality and extinguishes undesirable traits. The result is a modification of the horse's intrinsic ability to perform and obey commands."<sup>73</sup> As a result of this determination, the court held that horse training services were within the scope of the implied warranty of good and workmanlike performance.<sup>74</sup>

What standards are horse trainers to be held to? It will likely be a negligence standard measured against established practices. This standard may severely restrict innovative training techniques because they are not consistent with what an ordinary reasonable horse trainer would have done. Such a restriction is drastically unfair because of the differing

personalities of horses. Justice Gonzalez dissented based on the fact that horse trainers provide professional services.<sup>75</sup>

The nature of a professional's work is totally inconsistent with the idea that a professional gives an implied warranty guaranteeing an error-free performance. Unlike the manufacture, construction, repair or modification of tangible property, the rendition of professional services is neither mechanical nor routine. It requires the exercise of intellectual skill, judgment and discretion. This is certainly true in horse training.<sup>76</sup>

Hopefully, in the future, the Texas Supreme Court will correct this mistake. In the meantime, horse trainers beware.

### Exclusion or modification of implied warranties

The good and workmanlike performance warranty is nondisclaimable as previously discussed.<sup>77</sup> However, the implied warranties of merchantability and fitness for a particular purpose are disclaimable under U.C.C. section 2-316. The merchantability disclaimer may be oral but must use the word "merchantability" specifically.<sup>78</sup> The warranty of fitness for a particular purpose, on the other hand, must be disclaimed in writing.<sup>79</sup>

The disclaimer statute refers to a course of conduct exclusion whereby prior contact between the parties to the contract may exclude a disclaimer written into the contract.<sup>80</sup> In *Alpert v. Thomas* just such an exclusion was exemplified.<sup>81</sup> There, a written contract for sale excluded the implied warranties, but at the contract signing the seller's agent orally warranted the stallion's breeding capabilities.<sup>82</sup> The court held that the parties' course of conduct excluded the written disclaimer as to breeding capacity.<sup>83</sup>

The statute also acknowledges the fact that an implied warranty may be disclaimed by usage of trade.<sup>84</sup> The professional horseman should hesitate to rely on this provision too heavily, although, because a court may not necessarily uphold the usage of trade if the the court finds it to be unreasonable.<sup>85</sup> Also, parties may be held to an industry custom of which they are unaware.<sup>86</sup> An equine professional should educate himself on all relevant usages of trade, but not rely too heavily upon them for contractual protection.

The exclusion and modification statute also allows for the limitation of damages.<sup>87</sup> This limitation of damages provision is especially important because of the fact that it may be utilized even in connection with the good and workmanlike performance warranty.<sup>88</sup> The limitation must be reasonable, though, because the limitation of damages will not hold up if the remedy fails of its essential pur-

pose.<sup>89</sup> The draftsman must not try to overprotect his client, else the entire limitation clause will fail and the client will be left with no protection.<sup>90</sup>

<sup>1</sup> See U.C.C. §§ 2-315 and 316.

<sup>2</sup> See generally, 67 Am. Jur. 2d Sales § 512.

<sup>3</sup> See U.C.C. § 2-102.

<sup>4</sup> See U.C.C. § 2-314.

<sup>5</sup> See U.C.C. §§ 2-607(3)(a), 2-714(1).

<sup>6</sup> See U.C.C. § 2-105(1) (declaring that "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. 'Goods' also includes the unborn young of animals...").

<sup>7</sup> 755 S.W.2d 84, 85 (Tex. 1988).

<sup>8</sup> See generally Purcell, *What Warranties Do Farmers Give When They Sell Their Livestock?*, 2 Agric. L.J. 117 (1980-81); Soorholtz, *The Iowa Livestock Warranty Exemption: Illusory Protection for the Buyer*, 67 Iowa L. Rev. 133, 140 n. 60 (1981).

<sup>9</sup> U.C.C. § 2-104(1).

<sup>10</sup> See David B. Harrison, Annotation, *Farmers as Merchants Within the Provisions of UCC Article Two*, 95 A.L.R.3d 484 (1979 & Supp. 1994); *Dotts v. Bennett*, 382 N.W.2d 85 (Iowa 1986); *Nelson v. Union Equity Coop.*, 548 S.W.2d 352 (Tex. 1977).

<sup>11</sup> See U.C.C. § 1-201(28).

<sup>12</sup> U.C.C. § 2-104(1).

<sup>13</sup> See U.C.C. § 2-104 comment 1.

<sup>14</sup> See *Sessa v. Riegel*, 427 F. Supp. 760, 769 (E.D. Pa. 1977), aff'd 568 F.2d 770 (3d Cir. 1978) (one who races and deals with racehorses as a source of income falls into the category of merchant for purposes of U.C.C.'s implied warranty of merchantability.)

<sup>15</sup> See U.C.C. § 2-104(1).

<sup>16</sup> 470 F.2d 905 (10th Cir. 1972), aff'd, 503 F.2d 953 (10th Cir. 1974).

<sup>17</sup> *Id.* at 906, 907.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See U.C.C. § 2-607(3)(1).

<sup>21</sup> See Cohan, *The Uniform Commercial Code as Applied to Implied Warranties of "Merchantability" and "Fitness" in the Sale of Horses*, 73 Ky. L.J. 665, 682 (1984).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Supra* note 21, at 673.

<sup>26</sup> Looney, *Warranties in Livestock, Feed, Seed, and Pesticide Transactions*, 25 Mem. St. U.L. Rev. 1123, 1134 (1994), see also Ark. Code Ann. section 4-2-316(3)(d)(ii) (Michie 1991); Fla. Stat. Ann. section 672.316(3)(d) (West 1993); Ga. Code Ann. section 11-2-316(3)(d) (1994); Ill. Rev. Stat. Ch. 810, para 5/2-316(3)(d) (1993); Ind. Code Ann. section 26-1-2-316(3)(d) (Burns 1992); Kan. Stat. Ann. section 50-639 (1983); Ky. Rev. Stat. Ann. section 355.2-316 (Michie/Bobbs-Merrill 1987); Mich. Comp. Laws section 440-2316(3)(d) (1994); Miss. Code Ann. section 75-2-314(4) (1981); Mo. Rev. Stat. section 400.2-316 (1994); Mont. Code Ann. section 30-2-316(3)(d) (1993); Neb. Rev. Stat. section 2-316(3)(d) (1992); N.D. Cent. Code section 41-02-33(3)(e) (1983); Ohio Rev. Code Ann. section 1302.29 (Anderson 1993); Okla. Stat. Tit. 12A section 2-316(3)(d) (1995); Or. Rev. Stat. section 72-3160(3)(d) (1993); Tenn. Code Ann. section 472-315(4) (1992); Tex. Bus. & Comm. Code Ann. section 2.316(f) (West 1994); Wash. Rev. Code Ann. section 62A.2-316(3)(d) (West Supp. 1994); Wis. Stat. section 402.316(3)(c) (1993); and Wyo. Stat. section 34.1-2316(c)(v) (1991).

<sup>27</sup> *Supra* note 21, at 675. See generally 67 Am. Jur. 2d Sales § 512.

<sup>28</sup> *Andrews v. Peck*, 78 A. 445, 446 (Conn. 1910).

<sup>29</sup> *Id.*

Continued on page 7

Plants pay a price/Cont. from p. 1

tage due to their slower growth rate. The fitness costs of resistance to other herbicides is less clear. Weeds with mutations in the acetolactate synthase gene (the target of herbicides such as chlorsulfuron) have been thought to be equally competitive with their non-resistant counterparts in the absence of herbicide selection pressure, but the heterogeneity of weed populations makes this difficult to prove.

In the case of genetically engineered herbicide resistance, the gene mutations and genetic background of the transgenic crop are much more controlled than in resistant weeds. Nevertheless, it is not a simple task to determine the impact of a new gene on the overall fitness of a plant because it is difficult to discriminate between changes in fitness caused by the introduced gene itself and other disruptions arising during the process of engineering the transgenic plant. For example, unintended changes to the plant genome can be caused by the insertion of too many copies of the new gene, its position of insertion into the genome, or somatic mutations generated during plant transformation and regeneration.

Two recent papers in the Proceedings of the Royal Society of London addressed the costs of herbicide resistance in transgenic crucifers. Crawley and coworkers compared seed survival over winter in three lines of rapeseed (*Brassica napus*). Hails, R.S., M. Rees, D.D. Kohn, and M. J. Crawley. 1997. Burial and seed survival in *Brassica napus* subsp. *oleifera* and *Sinapis arvensis* including a comparison of transgenic and nontransgenic lines of the crop. Proc. Royal Soc. Lond. B 264:1-7. One line was not transformed,

while the others were transformed with genes that conferred resistance to either the antibiotic kanamycin (representing the plasmid alone), or kanamycin plus the herbicide glufosinate. They found that while 2% of the nontransgenic plant seeds survived one winter, less than 0.3% of transgenic seeds survived. (The level of dormancy, and thus overwintering, is low in domesticated rapeseed.) They did not find a significant difference between the two transformed lines, suggesting that simply inserting the plasmid, which carries the kanamycin-resistance selectable marker, caused the same reduction in fitness as the plasmid with the glufosinate resistance gene.

Such was not the result in the study by Lopez-Gutierrez and colleagues, who took several extra steps to ensure that their transgenic lines of *Arabidopsis thaliana* were only altered by the addition of a gene for chlorsulfuron resistance. Bergelson, J., C.B. Purrington, C.J. Palm, and J.-C. Lopez-Gutierrez. 1996. Costs of resistance: a test using transgenic *Arabidopsis thaliana*. Proc. Royal Soc. Lond. B 263:1659-1663. Plants with this herbicide-resistance gene were backcrossed two times to the parental line to remove any unwanted mutations induced during transformation. These were then selfed to produce two sets of plants, with one set being homozygous for the transgene and the second set homozygous for the absence of the transgene (controls).

As with the rapeseed study, separate lines were developed for plants transformed with plasmid alone (kanamycin resistant) and plasmid plus the chlorsulfuron resistance gene. After mea-

suring several growth parameters, a 34% reduction in seed production was observed in the herbicide-resistant plants as compared to the non-transgenic controls. Plants containing only kanamycin resistance did not show this reduction, so the decrease in seed production could only be attributed to the presence of the herbicide resistance gene. Other factors such as changes in gene dosage or mutations during regeneration were also ruled out.

These studies measured two important aspects of plant survival; seed production, and the ability to overwinter. Both studies found that transgenic plants were less fit than their non-transgenic counterparts, and in the absence of herbicide selection pressure would not be expected to survive over the long term as well as non-transgenic plants. The reason for the decreased fitness was not clear.

It should be noted that both cases involve herbicide resistance genes that are expressed continuously, which may represent wasteful carbon metabolism and energy drain over the lifetime of the plant. More research is required to explain the decreased fitness, and it is likely that fitness costs will have to be determined on an individual basis for each new gene used in genetic engineering. In the meantime, these studies seem to support the notion that in genetic engineering, as in life, nothing worthwhile is without its price.

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Continued from page 6

<sup>1</sup> *Id.*  
<sup>2</sup> American Quarter Horse Association, AQHA Official Handbook of Rules and Regulations 51 (1997).  
<sup>3</sup> Telephone interview with Melinda Ramos, Registration Department of the American Quarter Horse Association (Mar. 31, 1997).  
<sup>4</sup> Evans, J. Warren, and Anthony Borton and Harold Hintz and L. Dale Van Vleck, *The Horse* 366 (W.H. Freeman and Company 1990).  
<sup>5</sup> Interview with Dr. Heidi Brady, Ranch Horse Center Director, Texas Tech University (Mar. 31, 1997).  
<sup>6</sup> Telephone interview with Jim Marmon, Breeding Manager, Carol Rose Quarter Horses (Mar. 31, 1997).  
<sup>7</sup> *Id.*  
<sup>8</sup> Tex. Bus. & Com. Code Ann. § 2-316(f) (West 1994).  
<sup>9</sup> *Supra* note 26 at 1137.  
<sup>10</sup> See *Waddell v. American Breeders Serv., Inc.*, 505 P.2d 417 (Mont. 1973) (applying implied warranty of merchantability to bull semen sales); *Baden v. Curtiss Breeding Serv.*, 380 F.Supp. 243 (D. Mont. 1974) (applying warranty to shipment of bull semen).  
<sup>11</sup> See generally, Cohan, *The Uniform Commercial Code as Applied to Implied Warranties of "Merchantability" and "Fitness" in the Sale of Horses*, 73 Ky. L.J. 665 (1984); *Sessa v. Riegler*, 427 F. Supp. 760 (E.D. Penn. 1977); *Alpert v. Thomas*, 643 F. Supp. 1406 (D. Vt. 1986).  
<sup>12</sup> *Baden v. Curtiss Breeding Serv.*, 380 F.Supp. 243 (D.

Mont. 1974).  
<sup>13</sup> 505 P.2d 417, 419 (Mont. 1973).  
<sup>14</sup> *Id.*  
<sup>15</sup> Interview with Dr. Heidi Brady, Director of Texas Tech University Ranch Horse Center (Mar. 10, 1997).  
<sup>16</sup> Telephone interview with Mrs. Bill Morris, Breeding Department of Bill Morris Quarter Horses (Mar. 31, 1997).  
<sup>17</sup> *Id.*  
<sup>18</sup> 624 F.2d 1242 (5th Cir. 1980).  
<sup>19</sup> *Id.*  
<sup>20</sup> Krahmer, John, *Commercial Transactions*, 48 SMU L. Rev. 973, 981 (1995).  
<sup>21</sup> Tex. Bus. & Com. Code Ann. § 2-316(f).  
<sup>22</sup> U.C.C. § 2-315.  
<sup>23</sup> *Supra* note 49 at 981.  
<sup>24</sup> *Supra* note 51.  
<sup>25</sup> *Supra* note 26 at 1128.  
<sup>26</sup> U.C.C. § 2-315 cmt. 2.  
<sup>27</sup> *Supra* note 21 at 679.  
<sup>28</sup> 643 F. Supp. 1406, 1409 (D. Vt. 1986).  
<sup>29</sup> *Id.* at 1419.  
<sup>30</sup> U.C.C. § 2-135.  
<sup>31</sup> 910 P.2d 801, 805 (Ct. App. Ida. 1996).  
<sup>32</sup> *Willig v. Breihauer*, 274 P.2d 202 (Cal. App. 1954).  
<sup>33</sup> *Id.*  
<sup>34</sup> *Sessa v. Riegler*, 427 F. Supp. 760, 770 (3d Cir. 1978).  
<sup>35</sup> *Id.*

<sup>36</sup> *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987).  
<sup>37</sup> *Id.* at 354.  
<sup>38</sup> *Supra* note 49 at 986.  
<sup>39</sup> *Supra* note 76 at 354.  
<sup>40</sup> *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 577 (Tex. 1991).  
<sup>41</sup> 755 S.W.2d 84 (Tex. 1988).  
<sup>42</sup> *Id.* at 85.  
<sup>43</sup> *Supra* note 62.  
<sup>44</sup> *Supra* note 70.  
<sup>45</sup> *Id.*  
<sup>46</sup> *Id.* at 87.  
<sup>47</sup> *Id.*  
<sup>48</sup> *Supra* note 65.  
<sup>49</sup> *Id.*  
<sup>50</sup> *Id.*  
<sup>51</sup> 643 F. Supp. 1406, 1416 (1986).  
<sup>52</sup> *Id.* at 1410.  
<sup>53</sup> *Id.* at 1417.  
<sup>54</sup> 755 S.W.2d 84 (Tex. 1988).  
<sup>55</sup> U.C.C. § 1-205 cmt. 6.  
<sup>56</sup> U.C.C. § 1-205.  
<sup>57</sup> U.C.C. § 2-136(4).  
<sup>58</sup> 427 F. Supp. 760 (3rd Cir. 1978).  
<sup>59</sup> U.C.C. § 2-719(2).  
<sup>60</sup> *Id.*

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